Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

Altipenta, Inc., Petitioner

v.

Security Insurance, Co., Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Patrick J. Connors
11 W. Third Street
Media, PA 19063
(Counsel of Record for
Altipenta, Inc.)

John J. McCreesh, IV
7053 Terminal Square
Upper Darby, PA 19082

51 pp

QUESTION PRESENTED

Whether it is appropriate for this Court to enter an order granting certiorari, vacating the judgment , and remanding the case, is appropriate where the Court of Appeals did not consider or did not appear to fully consider a published decision issued approximately forty-five days after the Court of Appeals decision, when such published decision expressly rejected the reasoning upon which summary judgment was originally granted.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

Altipenta, Inc., Petitioner
v.
Security Insurance, Co., Respondent

PETTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Altipenta, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying petitioner's motion to recall the mandate (App. A, infra.1a) is unreported and set forth in Appendix A. The order of the court of appeals affirming the decision of the district court (App. B, infra. 2a-3a) is unreported and set forth in Appendix B. The order of the district court granting summary judgment (App. C, infra.. 4a-5a) is unreported and set forth in Appendix C. The opinion of the magistrate judge recommending summary judgment be granted (App. D, infra. 6a-30a)is unreported and set forth in Appendix D

JURISDICTION

The court of appeals entered its judgment on February 9, 1998 (App. B, infra. 2a-3a). On April 14, 1998 the court of appeals denied petitioner's motion to recall the mandate. (App. A, infra. 1a)

The jurisdiction of the district court was invoked under 28 U.S.C. 1332 because of diversity of citizenship between the parties. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) regarding appeals from decisions of the court of appeals and 28 U.S.C. 2106 regarding the Court's jurisdiction to enter a GVR order.

STATEMENT OF THE CASE

Petitioner, Altipenta, Inc. is the owner of a restaurant/tavern in Pennsylvania. On April 21, 1993 a patron of Altipenta, Inc. shot and killed two patrons at the tavern along with directly injuring one other, and allegedly indirectly causing the injuries of a fourth person. Several lawsuits were brought against Altipenta, Inc. based upon several theories of law including negligence theories such as: "negligent failure to provide adequate security", "negligent failure to provide adequate security after notification that a particular patron was a problem", "negligent failure to instruct or adequately train their security staff and bartenders", "negligently aloowing a patron to bring a weapon into the premises.". Altipenta, Inc. submitted these lawsuits to its insurance carrier, Security Insurance, Co. for coverage. Although the insurance company initially defended their insured under a reservation of rights, the insurance company was of the opinion that despite the negligence counts alleged in the complaint, the event was not covered because it was an intentional act and

therefore not an accident. The insurance company filed a declaratory judgment action in the United States District Court for the Eastern District of Pennsylvania to determine whether or not the insurance company had a duty to defend their insured. Security Insurance argued that the policy only covered an "occurrence" which was defined as an "accident", and since the patrons actions were intentional there was no "accident" and therefore no coverage.

The magistrate judge agreed with this analysis relying upon Gene's Restaurant, Inc. v. Nationwide Insurance Co., 519 Pa. 306, 548 A.2d 246 (1988) which held that an intentional act was not an accident and thus not a covered occurrence under the policy. The magistrate also relied on the long line of Eastern District of Pennsylvania cases which had followed the reasoning in Gene's Restaurant and expanded it to include any and every intentional act from the viewpoint of the person committing the act without regard to whether there was negligence averred against the insured and whether or not the act was expected or intended from the insured's point of view. The magistrate judge recommended that summary

judgment be granted, and on November 26, 1996 the district court entered summary judgment against Altipenta, Inc.

The Petitioner appealed this decision to the court of appeals. On February 9, 1998 the Third Circuit Court of Appeals issued an order of a three judge panel affirming the decision of the district court. Petitioner attempted to distinguish their case, however the third circuit affirmed the decision in an unpublished order. Due to the long line of cases in the Eastern District of Pennsylvania which held that an intentional act could never be an accident and therefore was not an occurrence, petitioner did not petition the court for a rehearing. Approximately forty days after this decision was affirmed the Third Circuit Court of Appeals in a case directly on point with the Altipenta case, held that the term "occurrence" includes bodily injury or death which is directly caused by the intenational act of a third party, but which is also attributable to the negligence of the insured. Nationwide Mutual Fire Insurance Company v. Pipher, 1998 WL 113933 (3rd Cir. (Pa.)(decided March 17, 1998) at p. 5. The Third Circuit stated that the insurance company's argument was based upon a

misreading of Gene's Restaurant, by the insurance company along with the district court decisions cited in the long line of cases interpreting Gene's Restaurant. This resulted in an "unwarranted extension of the import of that case." Nationwide v. Pipher at p. 3. The court of appeals concluded that, "In summary, we believe that the Pennsylvania Supreme Court would hold that an occurrence, as used in a liability insurance policy, includes a plaintiff's bodily injury or death that is the direct result of the intentional act of a third party when the injury or death is also attributable to the negligence of the insured." Id. at p. 6. This is a complete change in the interpretation of the law in the Third Circuit .

Upon reading this decision, Petitioner's attorney, promptly filed a Motion to Recall the Mandate and a Petition for Rehearing En Banc Nunc Pro Tunc. The Petitioner based his argument on the fact that had the district court, and the other panel had the opportunity to review the Pipher decision, summary judgment would never have been granted or affirmed as it was granted based upon what the same court of appeals considers to have been a misreading of the law. The court of appeals in a short order denied

the motion to recall the mandate because no substantive right will be affected by failure to grant the recall. (App. A, infra. 1a)

The question presented here is whether the court of appeals should have granted the motion to recall the mandate and grant the petition for rehearing en banc to determine the case based upon recent developments not relied upon by the district court or the court of appeals such decision being determinative of the final outcome of the case.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly granted certiorari, vacated judgment and remanded (GVR) in situations such as the present case when the court below did not fully consider a recent development and when there is a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation. Lawrence v. Chater, 516 U.S. 163, 167, 116 S.Ct. 604, 607 (1996). This Court has a broad power to GVR under Title 28 U.S.C. GVR. Id. at 166, at 606.. The standard that the Court applies in deciding whether to GVR is somewhat more liberal than the All Writs Act standard. Id. at 168, at 608.

The Court has GVR'd for many reasons, most importantly the Court has determined that a GVR was appropriate in a case almost identical to the present case. In Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Company, ___ U.S. ___, 117 S.Ct. 1731, 138 L.Ed 2d 91 (1997)

this Court decided that it was appropriate to GVR in a case where the holding of the federal appellate court below had been called into question by a recent decision of the highest state court. Lords Landing involved a declaratory judgment action interpreting the language of an insurance policy. In that case the district court had held that an "accident" did not include "natural and ordinary consequences of a negligent act". On August 6 the court of appeals affirmed. On September 17 petitioner's counsel learned of a case from the highest state court which cast into doubt the soundness of the Court of Appeals decision because it defined accident differently. The highest state court also expressly disapproved two decisions upon which the court of appeals had relied. Lord's Landing at 1732. The petitioner's motion to recall the mandate based upon a the recent development in the law was denied by the court of appeals. This Court held that a GVR was appropriate based upon the fact that the explicit disapproval of the cases relied upon gave the court reason to question the correctness of the court of appeals decision.

The facts of the present case are almost identical to Lords Landing. Both cases involve the definition of the word "accident" in an insurance policy and whether or not there should be insurance coverage based upon this interpretation. In both cases a case was decided shortly before (Lords Landing) or shortly after (Altipenta case) the court of appeals decision which questioned the correctness of the court of appeals decision. In the Altipenta case summary judgment was granted based upon the fact that the intentional act of the patron meant that it was not an "accident" and therefore not an "occurrence". Despite the fact that there were allegations of negligence by the insured throughout the complaints, the district court granted summary judgment relying upon Gene's Restaurant and the progeny of Third Circuit cases which extended this case to include any intentional act by a third party without regard to negligence claims against the insured was not an accident and therefore not an occurrence. Section D of the magistrate's report titled "Failure to provide adequate protection does not invoke coverage" cites the cases which deny coverage based upon an assault and battery whether or not negligence is claimed against

the insured. (18a-21a). It is this line of cases which was expressly rejected in a published opinion by the same court of appeals approximately forty days after the summary judgment in Altipenta was affirmed. In Pipher the Third Circuit Court of Appeals concluded that the district court decision holding that any intentional act of a third person even with negligence claimed against the insured had been based upon a misreading of Gene's Restaurant. Gene's Restaurant was a narrow decision which only applied because in that case there were no allegations of negligence against the insured. However, if the complaint alleged allegations of negligence it would be included as an occurrence and therefore would be covered under the policy. Given the Third Circuit's explicit disapproval of the cases upon which summary judgment was granted, there is reason to question the correctness of this the decision. Lastly, in Lords Landing this Court reasoned that although the recent decision was brought to the court of appeals attention in the motion to recall the mandate, the Court of Appeals ambiguous statement that the petitioners request was "without merit" did not establish that the court of appeals actually

considered and rejected the argument based upon the recent development. Likewise, in this case there is no indication that the Third Circuit Court of Appeals considered the Pipher argument. (Pipher involved coverage for an intentional murder committed by a third person. in the Pipher case there were allegations of negligence of the insured including "negligently failing to provide a reasonably safe premises for tenant" and "negligently fail[ed] to reinstall doors necessary for tenant's security. These allegations are almost identical to the allegations against Altipenta claiming that Altipenta was negligent in its duty to provide security.) Given the similarity of the allegations it is difficult to believe that the Third Circuit would hold that there is coverage in the one case and no coverage in the second, if the court had considered Pipher.

This case is also similar to the D.L. Thomas v. American Home Products, 519 U.S. ___ 117 S.Ct. 282, 136 L.ed.2d 201 (1996) and Huddleston v. Dwyer , 322 U.S. 232, 64 S.Ct. 1015 (1944). In both of those cases this Court remanded when the state supreme court's had entered decision's afterwards that called into question the correctness of the court of appeals decision. In D.L.

Thomas this Court GVR'd when the Supreme Court of Georgia handed down a decision after the 11th Circuit which made it clear that the 11th Circuits interpretation of Georgia law was incorrect. The present case is a little different in that it is a decision of the Third Circuit which makes it clear that the decision was based on an incorrect interpretation of the law. However, the Third Circuit expressly stated what they believed the Supreme Court of Pennsylvania would hold, and also expressly stated that the prior case law was based upon a misreading of the law. Therefore, the same principle should apply. It therefore is appropriate for the Court to continue to use the GVR procedure to allow the Third Circuit to reconsider the decision based upon the recent development which was not considered by the Third Circuit in the first instance.

CONCLUSION

The Third Circuit Court of Appeals affirmed a decision granting summary judgment in the case of Security Insurance. Co. v. Altipenta. This decision was based upon the fact that according to a long line of Eastern District of Pennsylvania cases an intentional act could never be an "accident" and therefore was not an occurrence and not covered by the policy. The Third Circuit Court of Appeals approximately forty days after affirming this decision decided in a published opinion that this line of cases was a misreading, unwarranted extension of the case law, and that as long as negligent acts of the insured were also alleged in the complaint there should be coverage. This decision is directly on point with the issue in the Altipenta case and had the Eastern District of Pennsylvania and the Third Circuit considered such decision they would have had to conclude that summary judgment should not have been granted and that there should be coverage as acts of negligence are alleged in the Altipenta case. Since Pipher holds that there is coverage for intentional acts of third parties when there are also allegations of negligence by the insured there

must be coverage in this case. This case is nearly identical factually to Lords Landing a 1997 case which held that a GVR was appropriate. Therefore, this case fits the cases in which this Court has held a GVR to be appropriate.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 97-1076

SECURITY INSURANCE, CO.

v.

ALTIPENTA, INC.

It is O R D E R E D that the motion for recall of mandate is DENIED because no substantive right of the applicant will be affected by failure to grant the recall of mandate. This is without prejudice to the applicant's right to file a timely petition for writ of certiorari.

_____

Circuit Judge

Dated: April 14, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1076

SECURITY INSURANCE COMPANY OF HARTFORD

v.

ALTIPENTA, INC., t/a PENNANTS; 3'HE PENNANT LOUNGE, INC., t/a PENNANT NIGHTCLUB, clPo/a THE PENNANT LOUNGE, a/k/a THE PENNANT BAR AND PENNANT ENTERPRISES, INC.; MACDADE MALL; .MARY A. PEPE, ADMINISTRATRIX OF THE ESTATE OF RICHARD PEPE, DECEASED; BARBARA DIMARIO, ADMINISTRATRIX OF THE ESTATE OF HOPE ANN POPOLEO, DECEASED, a/k/a HOPE ANN POPELEO; ANTHONY CASTERIOTO; TERYL WYRICK

Altipenta, Inc.,

Appellant.

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil Action No. 95-cv-06884)
District Judge: Honorable Thomas N. O'Neil, Jr.

Submitted under Third Circuit LAR 34.1 (a)
January 27, 1998

Before: SCIRICA, ROTH and RENDELL, Circuit Judges

APPENDIX B

JUDGMENT ORDER

After consideration of all contentions raised by appellant,

IT IS ADJUDGED AND ORDERED that the judgment of the District Court entered December 18, 1996, be and is hereby affirmed.

Costs to be taxed against appellant.

BY THE COURT.

_____

Attest:

_____

P. Douglas Sisk, Clerk

Dated: February 09, 1998

IN TIIE UNITED STATES DISTRICT COURT
FOR. THE EASTERN DISTRICT OF PENNSYLVANIA

SECURITY INSURANCE COMPANY OF HARTFORD

VS.

ALTIPENHA, INC. t/a PENNANTS, and THE PENNANT LOUNGE, INC. t/a PENNANT NIGHT CLUB d/b/a THE PENNANT LOUNGE aJ'k/a THE PENNANT BAR and PENNANT ENTERPRISES, INC. and MARY A. PEPE, Administratrix of the Estate of Richard Pepe, Deceased, and BARBARA DIMARIO, Administratrix of the Estate of HOPE ANN POPOLEO, Deceased a/k/a HOPE ANN POPOLEO, and ANTHONY CASTERIOTO, and TERYL WYRICK

CIVIL ACTION

No. 95-6884

0 R D E R

AND NOW, this 17 day of December 1996, in consideration of Plaintiff Security Insurance Company of Hm'tford's Motion for Summary Judgment, responses thereto and the Report and Recommendation prepared by United States Magistrate Judge Carol Sandra Moore Wells, it is hereby ORDERED that: (1) Plaintiff's Motion for Summary Judgment is GRANTED; (2) Declaratory Judgment is entered in favor of the

Plaintiff and against all Defendants; and (3) Security Insurance Company of Hartford has no duty to defend or indemnify its insured, Altipenha, Inc., t/a Pennants, in

(a) Mary. A. Pepe, Administratrix of the Estate of Richard Pepe, deceased v. Altipenha, Inc. Jndividually and d/b/a The Pennant Loung, a/k/a The Pennant Bar and The Pennant Lounge, Inc.. t/a The Pennant Night Club and Pennant Enterprises, Inc. and Teryl Wyrick, C.C.P.,No. 95-5131;

(b) Barbara DiMario, Administratrix of the Estate of Hope Ann Popoleo, decceascd, a/k/a the Pennant Bar and The Pennant Lounge, .Inc. t/a The Pennant Night Club and Pennant Enterprises, Inc. and Teryl Wyrick, C.C.P., No. 95-5161; and

(c) Anthony Casterioto v. Altipenha, Individually and d/b/a The Pennant Lounge, a/k/a the Pennant Bar and the Pennant Loung,Inc, t/a Pennant Night Club and Pennant Enterprises, Inc..... and Teryl Wyrick, C.C.P. No. 95-5124.

BY THE COURT:

_____

Thomas N. O'Neil, Jr., J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SECURITY INSURANCE COMPANY OF HARTFORD

VS.

ALTIPENHA, INC. t/a PENNANTS, and THE PENNANT LOUNGE, INC. t/a PENNANT NIGHT CLUB d/b/a THE PENNANT LOUNGE a/k/a
THE PENNANT BAR, and
PENNANT ENTERPRISES, INC., and MARY A. PEPE, Administratrix of the Estate of Richard Pepe, Deceased, and BARBARA DIMARIO, Administratrix of the Estate of
HOPE ANN POPOLEO, Deceased a/k/a HOPE ANN POPOLEO, and ANTHONY CASTERIOTO, and TERYL WYRICK

No. 95-6884

REPORT AND RECOMMENDATION

Plaintiff, Security Insurance Company of Hartford (hereinafter, "Security"), filed a declaratory judgment action pursuant to 28 U.S.C. □ 2201~ on October 30, 1995 to establish that it has no duty to defend or indemnify its insured, Altipenha, Inc. t/a Pennants (hereinafter, "Pennant Lounge"), or its patrons in connection with three personal injury actions pending in the Delaware County Court of Common Pleas (hereinafter,

"underlying actions"). Diversity jurisdiction over this case, pursuant to 28 U.S.C. 1332(a)(1), is uncontested. See Complaint for Declaratory Judgment 1-11. On May 24, 1996, plaintiff filed the instant motion for summary judgment urging that, as a matter of law, no covered "occurrence" transpired. All defendants, except Teryl Wyrick,2 filed responses opposing Plaintiffs proposed summary judgment and alleging that these injuries are or should be covered under the policy.

The main issue presented is whether three shootings inside the insured's premises constitute an insured "occurrence". For reasons elucidated below, I find that no insured event happened and, therefore, recommend that the court grant Security's Motion for Summary Judgment, enter a declaratory judgment in its favor, and issue an order declaring that Security has no duty to defend or indemnify defendants in connection with the three underlying actions.

I. BACKGROUND

On the evening of April 21, 1993, Defendant Teryl Wyrick shot and mortally wounded two restaurant patrons, Hope

Popoleo and Richard Pepe, and seriously injured Anthony Casterioto, a Pennant Lounge band member. The salient facts drawn collectively from the underlying complaints are that, on the night of the shootings, Wyrick had followed Popoleo and Pepe from bar to bar before they arrived at the Pennant Lounge. Several patrons at the Pennant Lounge observed Wyrick staring at Popoleo in a menacing, threatening, and unusual manner. Popoleo reported Wyrick's threatening actions to a bouncer and asked for help, as she believed Wyrick intended to cause bodily harm to her and Pepe. The bouncer informed Wyrick that he would have to leave if he did not refrain from bothering Popoleo and Pepe.

Wyrick exited the bar and re-entered 5 to 10 minutes later, carrying a concealed gun. He approached Popoleo, stated "here you go", pulled the gun from his fight side and shot her in the back three times as she attempted to run away. Wyrick then chased Pepe and shot him in the neck. Both Popoleo and Pepe died from their wounds. Band member Casterioto, struck in the neck and shoulder area by a .38 caliber bullet, survived the incident.

Three civil complaints were filed against Teryl Wyrick and Pennant Lounge in the Court of Common Pleas, Delaware County: Wrongful death and survival actions by Barbara DiMario, Administratrix of the Estate of Hope Popoleo3, and Mary Pepe, Administrat~x of the Estate of Richard Pepe4, and assault and battery and negligence claims by Anthony Casterioto.5

At the time of the shootings, Pennant Lounge was insured under a commercial general liability "occurrence policy" issued by plaintiff, Security. See Policy Number OPP 459220 attached as Exhibit 'L4" to Plaintiffs Motion for Summary Judgment. In response to the three lawsuits, Defendant Pennant Lounge sought legal representation and insurance benefits from Security. In a Reservation of Rights letter, Security denied owing any duty to defend or indemnify its insured on the basis that the shooting incident was not an "occurrence" as defined in the policy. It, nonetheless, has provided a defense of the underlying claims pending disposition of this declaratory judgment action.

II. Standard for Summary Judgment

The issue at hand is the interpretation of various insurance clauses, given the essentially uncontested facts recited above. Interpretation of insurance policies and insurance coverage matters are questions of law properly presented to the court on motion for summary judgment. Pacific Indemnity Co., v. Linn, 766 F.2d 754 (3d Cir. 1985); C.H. Heist Caribe Corp. v. American Home Assurance Co., 640 F.2d 479 (3d Cir. 1981); Equibank v. State Farm Mutual Automobile Insurance Co., 426 Pa. Super. 354, 626 A.2d 1243 (1993~. Under Fed. R. Civ. P. 56(c), summary judgment shall be granted "if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."

The moving party bears the initial burden of informing the court of the basis for its summary judgment motion. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). When considering the motion, any inferences should be viewed in the light most favorable to the non-moving party, and any doubt must be resolved against the moving party. Pastore v. Bell Telephone Co. of Pa., 24 F.3d 508, 512 (3d Cir. 1994); Tigg Corp. v. Dow Coming Corp.,

822 F.de 358, 361 (3d Cir. 1987). However, the non-moving party "may not rest upon the mere allegations or denial of its pleadings but...must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the evidence is merely "colorable" or is "not significantly probative", summary judgment may be granted. Id. at 249.

III. DISCUSSION

The precise issue this court must determine is whether Security has a duty to defend its insured, Pennant Lounge, under a policy which provides for a defense against claims of bodily injury arising from an "occurrence" where "occurrence" is defined as "an accident", and where claimants assert that injuries were sustained because the insured negligently failed to prevent intoxicated patron from intentionally shooting three individuals inside the insured's premises. Resolution of this dispute requires an examination of both the insurance policy and applicable insurance law.

A. Pennsylvania Insurance Law Governs

In this diversity case, the court must apply the substantive law of the state where it is located. Erie Railroad Co. v. Thompkins, 304 U.S. 64 (1938); Shields v. Consolidated Rail Corp., 810 F.2d 397, 399 (3d Cir. 1987). The question of insurance coverage presented herein is one of substance and not procedure. GEORGE J. COUCH, COUCH ON INSURANCE, {} 16:20 (2d ed. 1984). This court will, therefore, apply Pennsylvania law to the coverage issue now before it.

Pennsylvania law requires an insurance company to defend its insured whenever the complaint filed by the injured party may potentially come within the policy's coverage. Pacific Indemnity Company v. Linn, 766 F.2d 754, 760 (3d Cir. 1981), citing Gedeon v. State Farm Mutual Automobile Insurance Co., 410 Pa. 55, 58, 188 A.2d 320, 321-22 (1963). To determine whether a claim may potentially come within the coverage of the policy, the court should ascertain the scope of the insurance coverage and analyze the allegations in the complaint. Pacific

Indemnity Company v. Linn, supra at 760; Wilson v. Maryland Insurance Co., 377 Pa. 588, 593, 105 A.2d 304, 307(1954).

The scope of the policy is gleaned by reviewing the language of the policy to determine what circumstances the parties intended the contract to cover. Standard Venetian Blind Co. v. American Empire Insurance Co., 503 Pa. 300, 305, 469 A.2d 563, 566 (1983). The court should interpret the words according to their ordinary meaning. DiFabio v. Centaur Insurance Company, 366 Pa. Super. 590, 594, 531 A.2d 1141, 1143 (1987). "Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement ....Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language." Id.; C.H.Heist Caribe Corp. v. American Home Assurance Co, supra.

Once the court determines which claims the parties intended to cover, it then reviews the complaint to see whether any claims even possibly fall within the intended scope of coverage. If claims in the underlying suit may possibly be covered, then the

carrier must defend the lawsuit, even if it seems meritless. Gedeon v. State Farm Mutual Automobile Insurance Co., supra. If the claims, however, fall outside of the policy's coverage, the company need not defend the underlying lawsuit or indemnify its insured for any adverse judgment. Employers Reinsurance Corp. v. Sarris, 746 F. Supp. 560, 566-68 (E.D.Pa. 1990).

B. "Occurrence" is defined as "an accident" in this Policy.

Pennant Lounge's insurance contract with Security expressly provides bodily injury and property damage liability coverage for all "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies ...." So, if Pennant Lounge is found liable for the bodily injuries sustained herein, Security must reimburse it if the loss is the type covered under the policy. This policy specifies that "insurance applies to 'bodily injury' and 'property damage' only if: (1) The 'bodily injury' or 'property damage' is caused by an **'occurrence' ....**" *Policy at SI000017, Section I.A.1.a. (1)* (emphasis added). Hence, if and only if the underlying claimants' injuries were "caused by an occurrence",

coverage exists. Per insuring agreement "'**occurrence**' means **an accident**, including continuous or repeated exposure to substantially the same general harmful conditions." *Policy at SI000027, V. 9* (emphasis added).

In its most commonly accepted and ordinary meaning, an accident is "an event that is without apparent cause or unexpected; an unfortunate event, especially one causing injury or damage." The New Shorter Oxford English Dictionary, 13 (4th ed. 1993). Based upon the clear language of this contract, the parties intended Security to defend unexpected or chance happenings. Pennsylvania courts have consistently interpreted "occurrence" in a similar context to mean instances wherein the underlying injury was caused by "an accident" or a surprise event.

In Gene's Restaurant, Inc. v. Nationwide Insurance Co., 519 Pa. 306, 548 A.2d 246, 247 (1988), for example, the Pennsylvania Supreme Court, in deciding whether injuries sustained in a willful and malicious beating of one restaurant patron by another constituted an "occurrence", noted that "occurrence" was defined in the policy as "an accident"[6], and held

that the assault was an intentional tort. Consequently, the insurer owed no duty to defend. Id. Similarly, in Terra Nova Insurance Company, Ltd. v. North Carolina Ted, Inc., 715 F. Supp. 688, 692 (E.D.Pa. 1989), the district court held that barroom injuries sustained as a result of an intentional shooting could not constitute an "occurrence" for which the insurer owed a defense, because the shooting was not accidental in nature. Other cases have followed the above holdings. See Britamco v. Grzeskiewicz, 433 Pa. Super. 55, 639 A.2d 1208 (1994); Britamco v. Stone, 1992 WL 195378 (E.D.Pa.).

Claimants acknowledge that Wyrick "may have been guilty of intentional conduct" but urge that injuries which are "unexpected" or "accidental" from the insured's vantage point are covered. The foregoing cases, however, reason that surprise to the insured does not determine whether an incident is accidental. Rather, our courts examine the nature of the harmful act itself and the intent of the perpetrator to determine deliberateness. Terra Nova Insurance Co. v. Thee Kandy Store, Inc., 679 F. Supp. 476,

478 (1988). Justice Stout held in Gene's Restaurant, supra at 247, n 1:

> Gene's Restaurant argues that because it neither "expected" nor "intended" Ms. Aschenback's injuries, Nationwide had a duty to defend. Such a reading ignores the policy requisite that the "occurrence" must be an accident which a malicious, willful assault and beating could never be.

So, if the injuries in this case resulted from a willful assault from the perspective of Wyrick, they were not accidental, even if Pennant Lounge did not intend or expect them.

C. These intentional shootings are not covered "occurrences."

The shootings herein were definitely intended. Defendant Wyrick was indicted on two counts of first degree murder, among other charges. See Commonwealth v. Wyrick, No. 838-93. The Commonwealth proved that Wyrick (1) was the killer; (2) unlawfully killed a human being; (3) acted with specific intent to kill; and (4) killed after premeditation and deliberation. Commonwealth v. Mitchell, 528 Pa. 546, 551,599 A.2d 624, 626

(1991). The Delaware County jury's conviction, beyond a reasonable doubt, conclusively establishes that Wyrick's actions were deliberate and not accidental. Stidham v. Millvale Sportsmen's Club, 421 Pa. Super. 548, 566, 618 A.2d 945, 954 (1992). The shootings, thus, cannot, as a matter of law, constitute "accidents".

D. Failure to provide adequate protection does not invoke coverage.

Claimants further allege that Pennant, through its employees, negligently failed to prevent the "intentional acts" of Wyrick and that the policy covers such negligent omissions. Stated succinctly, claimants assert that Pennant Lounge negligently

1) failed to provide adequate security, even after notification that a particular patron was a problem;;

2) failed to provide adequate warning for claimari~ victims to avoid harm;

3) served liquor to a visibly intoxicated patron whom it allowed to remain on the premises;

4) failed to instruct or adequately train security staff, waitresses and bartenders; and

5) allowed a patron to reenter premises with a weapon/firearm after it knew or should have known he was likely to cause physical harm to patrons.

Claimants contend that the legal or proximate cause of the grievous injuries sustained was the unexpected reckless or negligent failure of Pennant's employees to prevent the incident, i.e., negligent nonfeasance. Complaint in Barbara DiMario v. Altipenha, Inc., supra, 18 (a-f), 19; Complaint in Mary A. Pepe v. Altipenha, Inc., supra, 21; Complaint in Anthony Casterioto v. Altipenha, Inc., supra, 21. The issue raised by these contentions is whether nonfeasance or negligent omissions which merely facilitate intentional harm-producing acts trigger coverage.

Pennsylvania courts have consistently denied coverage when a victim's injuries arose out of an assault and battery which, in turn, arose out of a restaurant or bar's negligence. See e.g., First Oak Brook Corporation Syndicate v. The Comly Holding Corporation, WL 479502 (3d Cir. 1996); Britamco v. Nathan

Stone, WL 195378 (E.D.Pa. 1992); Britamco Underwriters v. Norm's Union Station, WL 210323 (E.D.Pa. 1992); Terra Nova Insurance Co., Ltd. v. Powhattan Club, Inc., WL 18590 (E.D.Pa. 1987). Following the court's rationale, the direct legal cause of the victims; injuries in this case was actually the intervening, intentional, violent acts of Teryl Wyrick, not poor protection by Pennant Lounge.7 See Britamco Underwriters, Inc. v. Stone, supra, (no duty to defend or indemnify arose when the complaint asserted that bar owner negligently served liquor to an intoxicated patron who became violent and deliberately shot another patron); Terra Nova Insurance Co. Ltd. v. North Carolina Ted, Inc., 715 F. Supp. 688, 692 (E.D. Pa. 1989) (Judge Van Antwerpen held that the insurer need not defend a claim against a tavern owner who negligently failed to prevent injuries inflicted during an intentional shooting); St. Paul's Surplus Lines Insurance Co. v. 1401 Dixon's, 582 F. Supp. 865 (E.D.Pa. 1984)(injuries plaintiff sustained in a barroom brawl were caused by actions of the perpetrator, not the bar's negligence). The focus of the courts is, thus, on the nature of the harm producing act. Since the shootings which caused the

harm in the instant situation were intentional, the negligent nonfeasance of Pennant Lounge in not protecting the victims constitutes neither an "accident" nor an insurable "occurrence".

E. Exclusion Clause I.A.2.a. Is Unambiguous and Inapplicable

Exclusion I.A.2.a. clearly states that coverage does not apply to

"Bodily injury" or "property damage" expected or intended from the stand point of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property."

Policy at SIO0001 7, Section I-Coverages, A.2. a. (emphasis added). Pennant Lounge suggests that this clause broadens liability coverage beyond "accidental events", and modifies the term "occurrence" to include assaults and other intentional acts. It further asserts that said exclusion creates ambiguity, and therefore, must be construed against the insurer in favor of the insured to extend coverage to Pennant Lounge. The expressed language of the policy, however, shows the true intent of the parties. The exclusion (1) specifies that, generally intentional acts of the insured will not

be covered and (2) creates a narrow exception to cover injuries caused by the use of "reasonable force" to protect persons or property on the premises, e.g., a bouncer, waiter, employee or patron who injures an unruly or intoxicated patron.

The injuries sustained herein did not result from "reasonable force" used in defense of persons or property. The excessive and intentional force used under the circumstances was not the type of behavior the exclusion covers, because the force was not exerted to protect a potential victim. The perpetrator herein was precisely the type of individual the clause expected the bar owner to use reasonable force to evict. Nothing overt or hidden in this clause covers intentional, brutal assaults and batteries or murders by employees, patrons, or even intruders on the premises.

Defendants argue that, although negligent nonfeasance is not mentioned in the policy, this provision, by covering the intentional use of force, creates a reasonable expectation that Security will also insure injuries incurred as a result of the failure to use appropriate force, i.e., an employee who fails to protect a patron or prevent an assault.. 9 See Pennant Lounge Brief at 5;

affidavit of James Makita, President of Altipenha, Inc. I0 Mr. Makita's self-serving statements of expectation are irrelevant. When a clause in an insurance policy is clearly worded and conspicuously displayed, it will be given effect whether or not the insured in fact read the terms or understood their import. Standard Venetian Blind Co. v. American Empire Insurance Co., supra at 307, 469 A.2d at 567. An insured has no cause to complain that his reasonable expectations were frustrated when the policy language and limitations are clear and unambiguous. Bateman v. Motorists Mut. Ins. Co., 527 Pa. 241,245-46, 590 A.2d 281,283 (1991). The construction urged by Pennant Lounge far exceeds any reasonable expectation the parties could have had. If Pennant Lounge expected insurance to cover its own failure to protect patrons from intentional harm caused by the criminal acts of patrons, the policy would have so stated. The court should "not torture language" contained within an insurance policy to create ambiguities where none exist. Carpenter v. Federal Ins. Co., 637 A.2d 1008, 1012, 432 Pa. Super. 111, 118 (1994). See also Houghton v. American Guaranty Life Insurance Co., 692 F.2d 289,

291 (3d Cir. 1982). Nor should the courts provide coverage beyond that for which the parties bargained and paid. Caplan v. Fellheimer Eichen, Braverman, & Kaskey, 68 F.3d 828, 839-840 (3d Cir. 1995); Guardian Life Insurance of America v. Zerance, 479 A.2d 949, 953 Pa. 345, 353 (1984). Therefore, I find Exclusion I.A.2.a., both unambiguous and inapplicable.

F. No Dram Shop Liability Exists

Finally, Pennant Lounge asserts a liquor liability or "dram shop" claim. However, a clearly worded and conspicuously displayed liquor liability exclusion clause 11 irrefutably excludes coverage for injuries caused by serving alcoholic beverages to an intoxicated person. Even Claimants concede that Pennant has no viable "dram shop" coverage. See Claimants' Response, at 7. Thus, defense or indemnification regarding dram shop allegations is a non-issue.

VI. CONCLUSION

Pennsylvania law defines an insured "occurrence" as "an accident" where the harm-producing is "unintentional". The murders and assaults alleged herein were deliberate acts, therefore,

Security has no duty to defend or indemnify defendants. The narrow exception of Exclusion I.A.2.a. does not alter this result, nor does the insured's unilateral and unreasonable expectation of coverage for nonfeasance. A liquor liability exclusion clause prevents coverage based on the sale of alcohol to defendant Wyrick. Security is therefore, entitled to judgment as a matter of law. Accordingly, I recommend that an order be issued granting Plaintiff's Motion for Summary Judgment, entering Declaratory Judgement in favor of Plaintiff and declaring that Security Insurance Company of Hartford has no duty to defend or indemnify Pennant Lounge in connection with the three underlying actions.

Date: November 26, 1996

CAROL SANDRA MOORE WELLS
U.S. MAGISTRATE JUDGE

ENTERED: 11/26/96

FOOTNOTES

1. 28 U.S.C 2201(a) provides: "In a case of actual controversy within the jurisdiction...any court of the United States, upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

2 Teryl Wyrick did not defend against the underlying actions, therefore, default judgments were entered against him.

3. The complaint filed on behalf of Hope Popoleo is styled Barbara DiMario, Administratrix of the Estate of Hope Ann Popoleo, deceased, a/k/a Hope Ann Popoleo vs. Altipenha, Inc., Individually and d/b/a the Pennant Lounge a/k/a Pennant Bar and the' Pennant Lounge, Inc., and Tery1 Wyrick, C.C.P. of Del. Co., No. 95-5161.

4. The complaint filed on behalf of Richard Pepe is styled Mary A. Pepe, Administratrix of the Estate of Richard Pepe, deceased vs. Altipenha, Inc., Individually and dPo/a the Pennant Lounge, a/lc/a the Pennant Bar, and the Pennant Lounge, Inc., t/a Pennant Nightclub and Pennant Enterprises, Inc. and Teryl Wyrick, C.C.P. of Del. Co., No. 95-5131.

5. The complaint filed by Anthony Casterioto is styled Anthony Casterioto vs. Altipenha, Inc., Individually and d/b/a the Pennant Lounge a/k/a Pennant Bar and the Pennant Lounge, Inc., t/a Pennant Nightclub and Pennant Enterprises, Inc. and Teryl Wyrick, C.C.P. of Del. Co., No. 955124.

6. In Gene's Restaurant, Inc. v. Nationwide Insurance Co., 519 Pa. 306, 309, 548 A.2d 246, 248 (1988), the policy defined "occurrence" as an "accident, including continuous repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured .... "

7. Defendants' contend that cases containing insurance "assault and battery" exclhsion clauses are distinguishable because Security's policy contains none. However, the rationale underlying these cases is still that the real cause of harm is the acts of the perpetrator and not the negligent omission(s) or failure of the bar to prevent the criminal acts. This sound reasoning is applicable to and controls this case. See Sauter v. Ross Restaurants, Inc., No. 80-1202 (E.D.Pa. May 21, 1981), aff'd without op., 696 F.2d 985 (3d Cir. 1982).

8. Distinguish Britamco v. Weiner, 431 Pa. Super. 276, 282-283, 636 A.2d 649, 652 (1994) (Carrier required to defend bar where patron was struck in the neck, until facts clearly showed whether the object was thrown deliberately or accidentally).

9 Defendants point out that in Reczek v. Pennant Enterprises, Inc., C.C.P. of Del. Co. 9118400, Connecticut Specialty Insurance group (the parent company of Security) defended and indemnified

Pennant Lounge for a $1,500.00 arbitration award to the victim of an assault on its premises. Assuming ad arguendo a policy identical to the one at issue in this case, Reczek is still distinguishable, because that plaintiff was injured by bouncers who forcibly removed him from the bar where he had allegedly instigated trouble. Use of reasonable force to protect patrons is precisely the conduct Exclusion I.A.2.a. was intended to cover, thus Reczek is inapposite to this case in which one problematic patron intentionally injured other innocent patrons.

10 Mr. Makita's affidavit states: "The Pennant Lounge is a crowded bar, therefore we have bouncers. It is important for the insurance policy to cover any injuries that might occur due to the alleged negligence of my bouncers. When I read the policy, I took notice that the policy did cover bodily injury due to the reasonable use of force to protect persons or property. (Section I, Coverage A., Exclusion 2a.). I expected that this would cover any alleged negligence on behalf of my bartenders, whether it be because they caused injury through

the use of force, or because they caused injury from the lack of using reasonable force." Exhibit '5t" to Defendant Pennant Lounge's Response to Plaintiff's Motion for Summary Judgment.

11 The insuring agreement specifically excludes coverage for: c. "Bodily injury" or "property damage" for which any insured may be held liable by reason of (1) Causing or contributing to the intoxication of any person: (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alchoho: or (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages. Policy at SI000017, I.A..2.c.

Supreme Court, U.S.
FILED
JUN 11 1998
OFFICE OF THE CLERK

No. 97-1820

In The

Supreme Court of the United States

October Term, 1997

ALTIPENTA, INC.,

Petitioner,

vs.

SECURITY INSURANCE COMPANY OF HARTFORD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JONATHAN F. BALL
Counsel of Record
MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN
Attorneys for Respondent
1845 Walnut Street, 19th Floor
Philadelphia, Pennsylvania 19103
(215) 575-2784

QUESTION FOR REVIEW

Whether it is inappropriate for this Honorable Court to grant the instant petition for a writ of certiorari, vacate the court of appeals' judgment order, and remand the matter to the court of appeals for consideration of a subsequent decision by another panel of the court of appeals on a point of state law, issued after the court of appeals no longer had jurisdiction over the instant matter, when the subsequent decision disregarded an intermediate state appellate court case on point and instead made a contrary prediction as to how the highest state court would decide the issue?

STATEMENT OF INTERESTED PARTIES

Petitioner is Altipenta, Inc., one of the defendants before the district court and the appellant before the United States Court of Appeals for the Third Circuit[1]. Upon information and belief, Altipenta, Inc. does not have any parent companies or any nonwholly owned subsidiaries.

Respondent is Security Insurance Company of Hartford, the plaintiff before the district court and the appellee before the court of appeals. Security Insurance Company of Hartford is a wholly owned subsidiary of the publicly owned Orion Corporation. Security Insurance Company of Hartford has no nonwholly owned subsidiaries.

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[1] Mary A. Pepe, Administratrix of the Estate of Richard Pepe, Barbara DiMario, Administratrix of the Estate of Hope Ann Popoleo, and Anthony Casterioto, three of the other defendants in the proceedings before the district court, each initiated their own appeals to the court of appeals. However, the court of appeals dismissed their appeals for failure to prosecute. Thus, Petitioner Altipenta, Inc. remains the sole interested party among the defendants in the proceedings before the district court.

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I

COUNTERSTATEMENT OF THE CASE

Procedural History

On October 30, 1995, Respondent Security Insurance Company of Hartford (hereinafter "Security"), commenced a declaratory judgment action pursuant to 28 U.S.C. §2201, in the United States District Court for the Eastern District of Pennsylvania, which had jurisdiction pursuant to 28 U.S.C. §1331. In pertinent part, Security's complaint sought a declaration that it did not owe a duty to defend or indemnify its insured Petitioner Altipenta, Inc. (Altipenta), in three state court actions brought against Altipenta relative to shootings which occurred on April 21, 1993 inside a bar owned and operated by Altipenta[2]. Because the case presented an issue of law -- interpretation of the insurance policy issued by Security to Altipenta --

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[2] Security also named as defendants in the declaratory judgment action the plaintiffs in the underlying state court actions (see footnote 1, supra), and Teryl Wyrick, the perpetrator convicted of two counts of first degree murder in connection with the shootings inside Altipenta's bar.

rather that a genuine dispute as to any material fact, Security filed a motion for summary judgment. Security's motion and the responses thereto were referred to Magistrate Judge Carol Sandra Moore Wells.

The Magistrate Judge issued a Report and Recommendation wherein she recommended that District Judge Thomas N. O'Neill, Jr. grant Security's motion for summary judgment, enter declaratory judgment in favor of Security, and issue an order declaring that Security has no duty to defend or indemnify Altipenta in the state court actions brought by or on behalf of the victims of the April 21, 1993 shootings inside Altipenta's bar. (App. to Pet. for Cert. at 6a-25a). There were no objections to the Report and Recommendation of the Magistrate Judge. Consistent with the Magistrate Judge's Report and Recommendation, the District Judge entered an order on December 17, 1996, granting the Security's motion for summary judgment, entering declaratory judgment in favor

of Security and against Altipenta and the shooting victims, and declaring that the Security owed no duty to indemnify or defend Altipenta in the state court actions. (App. to Pet. for Cert. at 4a-5a).

Altipenta appealed the district court's order to the United States Court of Appeals for the Third Circuit[3]. By judgment order dated February 9, 1998, the court of appeals affirmed the grant of summary judgment in favor of Security. (App. to Pet. for Cert. at 2a-3a). Altipenta did not timely file a petition for rehearing. Thereafter, on March 3, 1998, the court of appeals issued a certified copy of the judgment order in lieu of a formal mandate.

On March 27, 1998, more than one month after the time for filing a petition for rehearing had passed and more than three weeks after the issuance of the certified copy of the judgment order in lieu of a formal mandate,

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[3] The shooting victims each filed their own appeals which were later dismissed for failure to prosecute. See footnote 1, supra.

Altipenta filed a motion requesting the court of appeals to recall the mandate and a petition for rehearing in banc nunc pro tunc. Altipenta based its motion and petition on the opinion issued by another panel of judges of the court of appeals in Nationwide Mutual Fire Insurance Company v. Pipher, 140 F.3d 222 (3d Cir. March 17, 1998). Altipenta essentially requested that the court of appeals apply Nationwide retroactively to the instant matter notwithstanding that there was no appeal pending in the instant matter at the time Nationwide was decided.

The court of appeals denied the motion to recall the mandate by order dated April 14, 1998. (App. to Pet. for Cert. at 1a). The petition for rehearing was not docketed presumably because it was filed outside of the allowable time and without leave of court. Thereafter, Altipenta filed the instant petition for a writ of certiorari requesting

this Honorable Court to GVR[4].

Factual Background

The facts underlying the instant matter have never been in dispute. They may be appropriately summarized as follows:

On April 21, 1993, Teryl Wyrick shot Hope Popoleo, Richard Pepe, and Anthony Casterioto inside of the Pennant Lounge, a bar owned and operated by Altipenta. (See Report and Recommendation; App to Pet. for Cert. at 7a-8a). Apparently, Wyrick had been following Popoleo and Pepe from bar to bar before they arrived at the Pennant Lounge. (Id.).

Popoleo expressed her concern regarding Wyrick's conduct, which she perceived as threatening, to a bouncer

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[4] GVR is the acronym ascribed to the procedure whereby this Honorable Court grants certiorari, vacates the judgment below, and remands the matter for further proceedings pursuant to 28 U.S.C. §2106. See, e.g., Thomas v. American Home Products, Inc., 519 U.S. ---, 117 S.Ct. 282, 136 L.Ed.2d 201 (1996).

at the Pennant Lounge. The bouncer had Wyrick leave the premises. (Id.).

Approximately five to ten minutes later, Wyrick re-entered the Pennant Lounge. He approached Popoleo and withdrew a gun which he had concealed. As Popoleo tried to run away, Wyrick shot her three times in her back. Wyrick also chased Pepe and shot him in the neck. Popoleo and Pepe died from their gunshot wounds. Casterioto, a member of a band playing at the Pennant Lounge, was also struck in the neck and shoulder area by a bullet fired by Wyrick. Casterioto survived the incident. (Id.). Wyrick was eventually tried before a jury and was convicted of, inter alia, two counts of first degree murder for the deaths of Popoleo and Pepe. Commonwealth v. Wyrick, Court of Common Pleas for Delaware County, Pennsylvania, No. 838-93.

Civil suits were filed against Wyrick and Altipenta by Casterioto and on behalf of Popoleo and Pepe. (See

Report and Recommendation; App. to Pet. for. Cert. at 9a). In response to the three lawsuits, Security, which insured Altipenta under a commercial general liability and property policy, issued a reservation of rights letter in which it denied any duty to defend or indemnify Altipenta because the shooting incident was not an "occurrence" as that term is defined by the policy. (See Report and Recommendation; App. to Pet. for Cert. at 9a). Security nonetheless provided a defense of the underlying claims pending disposition of the declaratory judgment action by the district court. (Id.).

As noted in the procedural history of the case, supra, the district court granted summary judgment in favor of Security and the court of appeals affirmed.

REASONS FOR DENYING THE WRIT

1. It is inappropriate for this Honorable Court to GVR the instant matter because there were no intervening or subsequent decisions from any Pennsylvania appellate court which cast any doubt on the status of the Pennsylvania law applied by the district court and the court of appeals.

Implicitly acknowledging that its petition for a writ of certiorari does not satisfy any of the traditional "considerations governing review on writ of certiorari" enumerated in this Honorable Court's Rule 10, Altipenta requests that this Honorable Court should nonetheless employ the GVR mechanism. Altipenta attempts to support its request by relying upon cases wherein this Honorable Court has deemed it appropriate to GVR where the federal appellate court's ruling is based upon a construction of state law that is inconsistent with an intervening or subsequent decision of the highest court of that state. This case, however, involves a subsequent, rather than intervening, federal appellate court decision

predicting how a state supreme court would rule on an issue of state law. The subsequent decision disregards an intermediate state appellate court decision on point and renders a contrary prediction as to how the highest state appellate court may rule on an issue of state law. For the reasons which follow, Security respectfully submits that it is inappropriate to GVR this matter.

The GVR mechanism has been employed in cases where a federal appellate court's decision on an issue of state law had been called into question by an intervening state supreme court decision on point, at least since this Honorable Court's decision in Huddleston v. Dwyer, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944). On at least two occasions in recent years, this Honorable Court has examined the propriety of the use of the GVR mechanism in such circumstances. See Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Company, --- U.S. ---, 117 S.Ct.

1731, 138 L.Ed.2d 91 (1997); Thomas v. American Home Products, Inc., 519 U.S. ---, 117 S.Ct. 282, 136 L.Ed.2d 201 (1996). Although the GVR mechanism has been used for some time, these recent decisions demonstrate that the Court is certainly not unanimous as to the circumstances under which it is appropriate to GVR in light of a subsequent development of state decisional law. See Lords Landing, supra at ---, 117 S.Ct at 1733 (Rehnquist, C.J. and Breyer, J., dissenting); Thomas, supra at ---, 117 S.Ct. at 282-284 (Scalia. J., concurring), and at 519 U.S. ---, 117 S.Ct. at 284-285 (Rehnquist, C.J. and Breyer, J., dissenting).

Even if the Court had been unanimous in its decisions to GVR in Lords Landing and Thomas, neither of those decisions would compel the Court to GVR in the instant matter because the instant matter is plainly distinguishable. In both of those cases, this Court GVR'd so that the involved courts of appeals could reconsider

their decisions on issues of state law in light of intervening or subsequent decisions which the involved states' supreme courts had rendered on the same issues. In the instant matter, however, Altipenta requests the Court to GVR to allow the court of appeals to consider a subsequent decision of another panel of judges in Nationwide Mutual Fire Insurance Company v. Pipher, 140 F.3d 222 (3d Cir. March 17, 1998) which predicts how the Pennsylvania Supreme Court may decide an issue of Pennsylvania law which it has not yet directly addressed. The distinction between a subsequent decision on a point of state law by that state's supreme court and a subsequent prediction by a federal appellate court in a diversity jurisdiction case as to how a state's supreme court would decide an issue of state law is critical.

As Justice Scalia points out in his concurring opinion in Thomas, it is appropriate to vacate and remand "to allow the court of appeals to consider an intervening

decision of the court that is the final expositor of a particular body of law...." Thomas, supra at ---, 117 S.Ct. at 283 (Scalia, J., concurring). As to the issue arising under Pennsylvania law whether an intentional shooting constitutes an occurrence under an insurance policy which defines an occurrence as an accident, the Pennsylvania Supreme Court is the final expositor of the law. Because Nationwide was a diversity jurisdiction case involving that issue of Pennsylvania law, the court of appeals was merely predicting how the Pennsylvania Supreme Court, as the final expositor of Pennsylvania law, would rule on that issue, which had not yet been presented to the Pennsylvania Supreme Court. See Nationwide, 140 F.3d at ---, 1998 WL 113933 at *7 (3d Cir. 1998)(Alito, J., concurring). As the Pennsylvania Supreme Court still has not directly addressed the issue implicated in the instant matter, which issue Altipenta maintains is identical to the issue presented in Nationwide, there has not been an

intervening or subsequent decision by the final expositor of the applicable law to justify this Court to GVR in this matter. Accordingly, this case is not on point with either Lords Landing or Thomas.

Moreover, absent a controlling intervening or subsequent decision from the Pennsylvania Supreme Court, this Honorable Court should be hesitant to GVR based solely upon the court of appeals' prediction in Nationwide as to how the Pennsylvania Supreme Court would rule. While the instant petition proceedings do not request this Honorable Court to accept the Nationwide case for further review on its own merits, it is respectfully submitted that the Court should nonetheless examine Nationwide for the limited purpose of deciding whether to GVR the instant matter.

Nationwide should not serve as a basis to GVR the instant case because the court of appeals in Nationwide appears to have disregarded highly persuasive authority on

the issue there in question emanating from the Superior Court of Pennsylvania, one of Pennsylvania's intermediate appellate courts. In his concurring opinion in Nationwide, Judge Alito correctly noted that when predicting in a diversity case how a state's highest court would rule on an issue of state law, the federal court of appeals is "instructed to heed the decisions of a state's intermediate appellate court unless [the judges of the federal court of appeals] are convinced by 'other persuasive data' that the state's highest court would reach a different result. Nationwide, 140 F.3d at ---, 1998 WL 113933 at *8 (Alito, J., concurring) quoting West v. American Tel. & Tel. Co., 311 U.S. 223, 237, 61 S.Ct. 179, 183-83, 85 L.Ed. 139 (1940). Yet the majority in Nationwide made only passing reference to the highly persuasive Superior Court of Pennsylvania opinion in Britamco Underwriters, Inc. v. Grzeskiewicz, 433 Pa.Super. 55, 639 A.2d 1208 (1994) without engaging in any analysis of that decision.

Nationwide, 140 F.3d at ---, n. 2, 1998 WL 113933 at *2, n. 2.

The lack of analysis of Grzeskiewicz should cast doubt on the Nationwide decision. In Grzeskiewicz, the Superior Court of Pennsylvania concluded that notwithstanding allegations that the insured bar was independently negligent for allowing an intentional attack to take place on its premises, the admittedly intentional attack by one patron of a bar on another patron did not constitute an occurrence under the insurance policy which defined occurrence as an accident. Compare Britamco Underwriters, Inc. v. Weiner, 431 Pa.Super. 276, 636 A.2d 649 (1994)(Where the underlying complaint alleged facts from which it could not be readily discerned whether one patron intentionally or negligently threw a bottle which struck and injured another patron, insurer had duty to defend insured bar unless and until the facts clearly demonstrated that the bottle had been thrown

intentionally). The policy under review in Grzeskiewicz was substantially similar to the policies in question in both Nationwide and the instant case relative to defining an occurrence as an accident. By relegating Grzeskiewicz to a mere passing reference in a footnote rather than analyzing that case and explaining why it found other Pennsylvania cases not directly on point and out of state cases more persuasive, the Nationwide majority arguably failed to follow the dictates of this Honorable Court in West with respect to heeding decisions of a state's intermediate appellate court as to an issue which the state's highest court has yet to address.

Altipenta does not suggest, and Security's research does not indicate that the Pennsylvania Supreme Court has given any indication that it will in fact follow the court of appeals' decision in Nationwide. Similarly, Altipenta does not suggest, and Security's research does not indicate that the Third Circuit will not faithfully adhere to its decision

in Nationwide in prospective fashion absent a contrary disposition of the involved issue of state law by the Pennsylvania Supreme Court. In tandem, these factors mitigate against the employment of the GVR mechanism in the instant case.

Throughout the time that the instant matter was sub judice before the district court and the court of appeals, those courts applied the pertinent Pennsylvania law as it was then in effect. See Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543, 61 S.Ct. 347, 350, 85 L.Ed. 327 (1941)("... until such time as a case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.")(footnote omitted). At that time, the most instructive Pennsylvania Supreme Court decision was Gene's Restaurant, Inc. v. Nationwide Insurance Company, 519 Pa. 306, 548 A.2d 246 (1988) as most

recently interpreted and applied by the Superior Court of Pennsylvania in Grzeskiewicz. The district court relied upon Gene's Restaurant and Grzeskiewicz in granting summary judgment in favor of Security. The court of appeals affirmed without opinion. There was no change in Pennsylvania law announced by any Pennsylvania appellate court at any time prior to the expiration of the time for Altipenta to have sought reargument before the court of appeals.

At the time of the filing of Altipenta's petition to this Honorable Court, as well as at the time of the filing of this brief in opposition, Gene's Restaurant and Grzeskiewicz remain good law in Pennsylvania. They have not been overruled or severely limited in their application. Nationwide is not a decision of a Pennsylvania appellate court. Thus, if this Honorable Court were to grant certiorari and review this case on its merits (which Security submits it should not), this

Honorable Court would be constrained to apply Gene's Restaurant and Grzeskiewicz. Because this matter was decided in conformity with those Pennsylvania decisions at all levels below, and because there has been no intervening or subsequent decision of a Pennsylvania appellate court which casts doubt on the continuing precedential value of those cases, there is no reason to GVR this case.

CONCLUSION

For all of the foregoing reasons, it is not appropriate for this Honorable Court to either grant a writ of certiorari or GVR the instant matter. Respondent Security Insurance Company of Hartford respectfully requests this Honorable Court to deny the instant Petition for Certiorari.

Respectfully submitted,

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

By: _____
Jonathan F. Ball, Esquire

1845 Walnut Street, 19th Floor
Philadelphia, PA 19103
(215) 575-2784

Attorneys for Respondent Security Insurance Company of Hartford

Dated: June 11, 1998